# Supreme Court of the United States

OCTOBER TERM, 1942

No. 850

MILDRED MAYO DEAL, ..... *Petitioner,*

v.

VENDA C. ABRAMSON, ..... *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

CHARLES T. COLEMAN,
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*Counsel for Petitioner.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Mildred Mayo Deal, was the appellant in the case of *Mildred Mayo Deal* v. *Venda C. Abramson* in the Circuit Court of Appeals for the Eighth Circuit, which court affirmed the decree of the District Court in that case.

Your petitioner respectfully shows that the Circuit Court of Appeals decided an important question of the

local law of Arkansas in conflict with the applicable decisions of the Supreme Court of Arkansas.

## I.

### *Summary statement of the case.*

This is a suit by Mildred Mayo Deal against Venda C. Abramson to recover an undivided one-half interest in a farm in Arkansas. The farm was owned by Tennie Mayo, who is the common source of title, and both parties claim under her will.

Tennie Mayo had only one child, Lawrence Mayo, whose wife was Kate Mayo. At the time she executed the will, and at the time of her death, Lawrence and Kate had no children.

Tennie Mayo's will was as follows:

> "I give and bequeath all of my real estate of whatever description to my son Lawrence Mayo and his wife Kate Mayo and their heirs during their natural life time, to be used for their support and maintenance only as long as they shall live, with the express understanding that they are not to mortgage or sell the same. After the death of my said son Lawrence and his wife Kate Mayo and their heirs all of my real estate shall revert to my legal heirs." Rec 17

After the death of Tennie Mayo, Lawrence and Kate had one child, Nathan Mayo. Kate died and Lawrence remarried. There was only one child of his second marriage, Mildred Mayo, who is the plaintiff.

Lawrence and Kate conveyed the farm by warranty deed to Rudolph Abramson. Nathan Mayo also executed

a warranty deed to Rudolph Abramson. Rudolph Abramson devised the farm to the defendant, Venda C. Abramson.

Lawrence Mayo died February 16, 1937, leaving two children, Nathan C. Mayo, the child of the first marriage, and Mildred Mayo Deal, the child of the second marriage. The life estate in Lawrence and Kate Mayo terminated at Lawrence's death. His daughter, Mildred Mayo Deal, then brought this suit to recover an undivided one-half interest in the farm under her grandmother's will. No question of the statute of limitations is involved. Rec 17

On the termination of the life estate the will of Tennie Mayo, construed according to the Arkansas decisions, vested an undivided one-half interest in the farm in the testatrix's grandson, Nathan Mayo, which passed by his deed to the defendant, and an undivided one-half interest in her granddaughter, Mildred Mayo. Under the decision of the Circuit Court of Appeals in this case the granddaughter is disinherited and takes nothing.

If the decision is allowed to stand, the title to real property in Arkansas under wills similar to Tennie Mayo's will go to one claimant if it is adjudicated in a state court, and will go to an entirely different claimant if it is adjudicated in a federal court.

## II.

*Reason relied on for the allowance of the writ.*

If the decision of the Circuit Court of Appeals in this case stands, it will create two antipodal rules controlling the testamentary disposition of real property in Arkansas. The Arkansas decisions hold that the inten-

tion of the testator, to be gathered from the whole will, must govern the disposition of his property, even though it runs counter to the ordinary rules which would otherwise control. The Circuit Court of Appeals held in this case that the rule in Shelley's case should govern, even though it defeated the clear intention of the testatrix.

III.

Wherefore your petitioner prays that a writ of *certiorari* issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court a full and complete transcript of the record in the proceedings of that court in *Mildred Mayo Deal* v. *Venda C. Abramson,* No. 12411, to the end that this case may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgment of the United States Circuit Court of Appeals be reversed by this court, and for such further relief as to the court may seem proper.

Dated this 15th day of March, 1943.

CHARLES T. COLEMAN,
BURK MANN,
RICHARD B. MCCULLOCH,
SHIELDS M. GOODWIN,

1115 Boyle Building,
Little Rock, Arkansas,

*Counsel for Petitioner.*

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No.....

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MILDRED MAYO DEAL, .....*Petitioner,*

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*Brief in support of petition for writ of certiorari.*

The opinion of the Circuit Court of Appeals for the Eighth Circuit appears in 132 Fed. (2d) 252.

The date of the decree to be reviewed is December 28, 1942.

The jurisdiction of this court is invoked under the act of Congress of February 13, 1925, Ch. 229, 43 Statutes 936, 237 B. of the Judicial Code, section 240, 28 U.S.C.A. section 347, relating to the issuance of writs of *certiorari* to bring up for review judgments of the Circuit Courts of Appeals.

## POINTS AND AUTHORITIES RELIED ON.

### I.

*The Circuit Court of Appeals has decided an important question of the local law of Arkansas in a way that is in conflict with the Arkansas decisions.*

### II.

*According to the decisions of the Arkansas courts the intention of the testator if clearly expressed controls over all technical rules of construction.*

*LeFlore* v. *Handlin,* 153 Ark. 421, 240 S.W. 712.

*Board of Directors St. Francis Levee District,* v. *Brown,* 90 Fed. (2d) 686 (C.C.A. 8).

### III.

*Under the decisions of the Arkansas courts the will of Tennie Mayo devised a life estate to Lawrence and Kate Mayo, with remainder in fee to the two grandchildren of the testatrix, who were her sole heirs at law.*

*Bowen* v. *Frank,* 179 Ark. 1004, 18 S.W. (2d) 1020.

*Gist* v. *Pettus,* 115 Ark. 400, 171 S.W. 480.

*Driver* v. *Driver,* 187 Ark. 875, 63 S.W. (2d) 274.

*Hughes* v. *Edwards,* 198 Ark. 673, 130 S.W. (2d) 713.

*Williams* v. *Chambers,* 195 Ark. 654, 113 S.W. (2d) 722.

*Hardage* v. *Stroop,* 58 Ark. 303, 24 S.W. 490.

*Yeates* v. *Yeates,* 179 Ark. 543, 16 S.W. (2d) 996.

*Wallace* v. *Wallace,* 179 Ark. 30, 13 S.W. (2d) 810.

*Rolfe* v. *Coates,* 282 Fed. 586 (C.C.A. 8)

## ARGUMENT.

### I.

*The Circuit Court of Appeals has decided an important question of the local law of Arkansas in a way that is in conflict with the Arkansas decisions.*

This is a suit by Mildred Mayo Deal against Venda C. Abramson to recover an undivided one-half interest in a farm in Arkansas. The farm was owned by Tennie Mayo, who is the common source of title, and both parties claim under her will.

Tennie Mayo had only one child, Lawrence Mayo, whose wife was Kate Mayo. At the time she executed the will, and at the time of her death, Lawrence and Kate had no children.

Tennie Mayo's will was as follows:

> "I give and bequeath all of my real estate of whatever description to my son Lawrence Mayo and his wife Kate Mayo and their heirs during their natural life time, to be used for their support and maintenance only as long as they shall live, with the express understanding that they are not to mortgage or sell the same. After the death of my said son Lawrence and his wife Kate Mayo and their heirs all of my real estate shall revert to my legal heirs." Rec 17

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a warranty deed to Rudolph Abramson. Rudolph Abramson devised the farm to the defendant, Venda C. Abramson.

Lawrence Mayo died February 16, 1937, leaving two children, Nathan C. Mayo, the child of the first marriage, and Mildred Mayo Deal, the child of the second marriage. The life estate in Lawrence and Kaye Mayo terminated at Lawrence's death. His daughter, Mildred Mayo Deal, then brought this suit to recover an undivided one-half interest in the farm under her grandmother's will No question of the statute of limitations is involved. Rec 17

On the termination of the life estate the will of Tennie Mayo, construed according to the Arkansas decisions, vested an undivided one-half interest in the farm in the testatrix's grandson, Nathan Mayo, which passed by his deed to the defendant, and an undivided one-half interest in her granddaughter, Mildred Mayo. Under the decision of the Circuit Court of Appeals in this case, the grandaughter is disinherited, and takes nothing.

If the decision is allowed to stand, the title to real property in Arkansas under wills similar to Tennie Mayo's will go to one claimant if it is adjudicated in a state court, and will go to an entirely different claimant if it is adjudicated in a federal court.

## II.

*According to the decisions of the Arkansas courts the intention of a testator, if clearly expressed, controls over all technical rules of construction.*

> "Over and over again we have said that the rule in the construction of wills is to give effect to what

appears to be the intention of the testator in view of all the provisions of the will. * * * In the case of *Eagle* v. *Oldham, supra,* we cited and quoted *Smith* v. *Bell,* 31 U. S. 68, where Chief Justice Marshall said: 'The first and great rule in exposition of wills (to which all other rules must bend) is that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

*LeFlore* v. *Handlin,* 153 Ark. 421.

The Circuit Court of Appeals has held that the foregoing is the rule for the construction of wills as established by the Arkansas decisions. The court said:

"As this will in question affects the title to real estate situated in the State of Arkansas, its construction must be under the laws of Arkansas. * * * In construing a will, the testator's intention must be determined from a construction of the instrument as a whole, and technical rules of construction should not be resorted to where the application of such rules defeats the manifest intention of the testator."

*Board of Directors St. Francis Levee District* v. *Brown,* 90 Fed. (2d) 686 (C.C.A. 8)

III.

*Under the decisions of the Arkansas courts the will of Tennie Mayo devised a life estate to Lawrence and Kate Mayo, with remainder in fee to the two grandchildren of the testatrix, who were her sole heirs at law.*

The will of Tennie Mayo devises her real estate to Lawrence and Kate Mayo and their heirs. If the will had stopped at this point, it would have vested a fee simple estate in Lawrence and Kate. Under the decisions in Arkansas, however, a devise of a fee simple estate is cut

down to a lesser estate, such as a life estate, if the provisions of the will taken as a whole clearly indicate that such is the intention of the testator.

The case of *Bowen* v. *Frank*, 179 Ark. 1004, is exactly in point. The fourth item of the will involved in that case was as follows:

> "I hereby give, devise and bequeath to my seven children and legal heirs, to-wit, Charles F., Robert B., John L., Walter A., Clara M., Elizabeth G., and Leonora E. Frank, now Mrs. S. A. Bowen, all of my property, real, personal and mixed, wheresoever situated, not already disposed of, which I now own or may hereafter acquire, and of which I may die seized and possessed, absolutely and in fee simple, and in equal shares."

A subsequent provision of the will was as follows:

> "The property of my daughters, however, shall be held and owned by them for their sole and separate use and enjoyment, free from the debts and contracts of any husbands, for and during their natural lives, with remainder in fee to their children, and in default of children surviving either of them, then to my children who shall then be living, their heirs and assigns forever."

In construing this will the Supreme Court of Arkansas said:

> "The first clause of the fourth item provides equally for each of the seven children of the testator, and devises an estate in fee simple to each of them, sons and daughters alike. The last clause of this item, however, announces an unmistakable intention to limit the interest of his daughters to a life estate in their respective shares, as clearly as his intention in the opening clause had by its terms created an own-

ership in fee. There is no ambiguity or obscurity in either of these clauses, and no room for the operation of the rule that a clear grant of the fee by an earlier provision of the will will not be modified or qualified by a later obscure and ambiguous provision, as said by the Tennessee court. Since the last clause in a will governs in its construction in determining the intention of the testator, we are constrained to agree to the holding of the Tennessee court, that it was the intention of the testator to devise to his said three daughters a life estate only, with a remainder in fee to their children, and if no children, then to the children of the testator then living, their heirs and assigns."

*Bowen* v. *Frank,* 179 Ark. 1004, 18 S.W. (2d) 1037.

To the same effect see:

*Gist* v. *Pettus,* 115 Ark. 400, 171 S.W. 480.

*Driver* v. *Driver,* 187 Ark. 875, 63 S.W. (2d) 274.

*Hughes* v. *Edwards,* 198 Ark. 673, 130 S.W. (2d) 713.

*Williams* v. *Chambers,* 195 Ark. 654, 113 S.W. (2d) 722.

The decision of the Circuit Court of Appeals is directly in conflict with the decision of the Supreme Court of Arkansas in *Bowen* v. *Frank, supra.* The court found that the intention of the testatrix was to give a life estate only to Lawrence and Kate. "Clearly," the court said, "a life estate was intended so far as Lawrence and Kate Mayo were concerned." Yet the court construed the will as devising a fee simple estate to Lawrence and Kate.

The Arkansas courts would have given effect to what is conceded to be the clear intention of the testatrix. The

Circuit Court of Appeals defeated this clear intention by the application of technical rules of construction.

The Circuit Court of Appeals said:

> "The cardinal rule in the construction of wills is that the intention of the testator must be ascertained if possible and must be given effect, unless in contravention of some established rule of law or public policy. * * * It is well settled, however, that a will cannot be construed so as to effectuate an intention of the testator which is contrary to a rule of law or public policy."

The rule of law which the court mentions was the rule in Shelley's case. The court holds that the intention of the testator cannot be effectuated if it is contrary to this rule.

We have shown that under the Arkansas decisions a devise of a fee simple estate in express terms can be cut down to a life estate by subsequent provisions in the will indicating that such is the intention of the testator. The Circuit Court of Appeals holds, in effect, that if the language of the will creates a fee simple estate, not in express terms, but by the operation of the rule in Shelley's case, the fee simple cannot be cut down to a life estate by subsequent provisions in the will, though "clearly a life estate was intended."

The Circuit Court of Appeals gave effect to the intention of the testatrix by cutting down the fee simple estate devised by the words "to my son Lawrence Mayo and his wife Kate Mayo and their heirs" to a life estate because of the qualifying words "during their natural life time," for, the court said, "clearly a life estate was

intended so far as Lawrence and Kate Mayo were concerned." The devise to them and to their heirs did not give them the fee because it was clearly the intention of the testatrix that they should not take the fee. But the court defeated the intention of the testatrix by first construing the will as a devise to Lawrence and Kate for life with remainder to their heirs, and then applying the rule in Shelley's case. The court thereby used the intention of the testatrix to cut down a fee simple to a life estate and then used the rule in Shelley's case to build a life estate back into a fee simple estate, contrary to the intention of the testatrix.

Tennie Mayo did not devise her propery to Lawrence and Kate for life, with remainder in fee to their heirs. She devised a life estate to them with remainder after their deaths to her own heirs, who turned out to be her two grandchildren.

While Tennie Mayo knew nothing of the technical rules of construction, the will shows that she thoroughly appreciated the difference between a fee simple estate and a life estate. She owned the farm involved in this litigation, and also a house and lots in the town of Holly Grove not far from the farm. She devised both the farm and the house and lots to Lawrence and Kate for their lives, with the remainder to her own legal heirs. After her will to that effect was written and read to her, she changed her mind and likewise changed her will. She decided to give the house and lots to Lawrence and Kate in fee simple. To do this she added the following to her will:

> "After having heard the above will read, I hereby give and bequeath unto my son Lawrence Mayo and his wife Kate Mayo and unto their heirs my house and lots in the town of Holly Grove to dispose

of as they may see fit, but all of my other real estate shall be disposed of as heretofore written or expressed in the other will." Rec 17

The effect of the decision of the Circuit Court of Appeals is to give the farm to Lawrence and Kate in fee simple as well as the house and lots in the town of Holly Grove. This was directly in the face of the declared intention of the testatrix. It was directly in conflict with the established rule of property in the State of Arkansas as evidenced by the decisions of the Supreme Court of that state.

The Circuit Court of Appeals gave effect to the intention of the testatrix for one purpose and refused to give effect to it for another. The devise to Lawrence and Kate "and their heirs," standing alone, would have created a fee simple estate in them. But these words were followed by the qualifying words "during their natural life time." The court therefore said that "clearly a life estate was intended so far as Lawrence and Kate were concerned." They did not take the fee, though the devise to them and their heirs carried the fee, because, according to the court, the subsequent qualifying words showed that it was not the intention of the testatrix to give them the fee.

But the court defeated the intention of the testatrix, which the court used to cut the fee to a life estate, by applying the rule in Shelley's case so as to build the life estate back into a fee, though the testatrix clearly did not intend to give the fee.

The court said:

"The testatrix included the heirs of Lawrence and Kate, and in form this was a devise of a re-

mainder to them. But a devise to one for life remainder to his heirs vests in the first taker a fee simple title."

The court, by construction, made a new will which was very different from Tennie Mayo's will, and thereby defeated the clear intention which she expressed in her will. It resolved her devise to Lawrence and Kate and their heirs, which standing alone would have vested the fee in them, into two separate component parts, namely, to Lawrence and Kate for life, remainder to their heirs. The court then held that the devise to them and their heirs did not vest the fee, because the will showed that she did not intend to give them the fee, but that the same devise, construed as a devise to them for life with remainder to their heirs, did vest the fee in them, though the will equally showed that even in that case she did not intend to give them the fee.

There is no rule of law or of public policy in Arkansas which would prevent a testator from contravening the rule in Shelley's case, or from devising his property contrary to that rule.

Tennie Mayo, of course, never heard of the rule in Shelley's case, but she knew that the laws of Arkansas permitted her to dispose of her property as she saw fit. If, however, she had been familiar with the rule in Shelley's case, and had devised her real property to Lawrence and Kate for their lives with remainder in fee to their heirs, but had added: "I know that the above devise, under the rule in Shelley's case, would vest the fee simple title in Lawrence and Kate, but it is my intention to give them only a life estate with remainder in fee at their death to my legal heirs," the devise would have created only a life

estate in the first takers, under the Arkansas decisions, with remainder to the testatrix's heirs, in spite of the rule in Shelley's case.

Through an involved method of technical construction the Circuit Court of Appeals ran counter to the decisions of the Supreme Court of Arkansas, which give effect to the intention of the testator when it clearly appears, regardless of the rules of construction which the state courts only apply in an effort to arrive at intention, and decided an important question of local law in conflict with the applicable state decisions.

If the decision stands, an owner of real property in Arkansas cannot devise it contrary to the rule in Shelley's case, even though he expressly declares his intention to do so. That is the result which the court reached in the present case. The court held that Lawrence and Kate took the fee under the rule in Shelley's case, notwithstanding the fact that the will construed as a whole clearly showed that the testatrix intended that they should take only a life estate, and the will provided that the fee should go to the testatrix's heirs and not to the heirs of Lawrence and Kate. The Arkansas decisions would have given full effect to the intention of the testatrix even if the will, in express technical terms, had devised the property to Lawrence and Kate and their heirs in fee simple, but had followed the devise of the fee with the limitation cutting it down to a life estate with remainder to the heirs of the testatrix. In this respect the decision of the Circuit Court of Appeals is in irreconcilable conflict with the decisions of the state courts, and will unsettle titles and create great confusion in the law of wills and of real property in Arkansas.

The Circuit Court of Appeals treated the rule in Shelley's case as sacrosanct, and allowed its application to influence it in arriving at the intention of the testatrix. This is contrary to the decisions of the Arkansas courts.

> "The rule in Shelley's case is never a means to discover the intention. It is applicable only if that has been discovered."
>
> *Hardage* v. *Stroop,* 58 Ark. 303.

When the intention of the testator is once discovered from the will as a whole, the rule in Shelley's case can be applied in carrying out the intention if it is consistent with the intention. It can never be applied, under the Arkansas decisions, to defeat the intention of the testator.

A husband devised his real property to his wife "and the heirs of her body." Under the rule in Shelley's case, as it existed at the common law, this would have vested a fee simple estate in the wife. Under a statute of Arkansas modifying the rule in Shelley's case, it would have vested a life estate in the widow, with the remainder in fee in the heirs of her body. But the words "to my wife and the heirs of her body," were followed by the words "for their absolute use and benefit for her lifetime." It was contended that the widow took a life estate and her children the remainder in fee. But the court held that the intention of the testator must prevail, and that the language of the will showed that his intention was that the children should share in the life estate, as well as take the remainder.

> *Williams* v. *Chambers,* 196 Ark. 654, 113 S.W. (2d) 722

A devise was to the testator's wife for her life, then two-fifths of the estate to the testator's daughter, Pauline, "to be held by her and her heirs." The next sentence was: "At her death all the same to go to her bodily heirs, should she leave any, but if she should leave none, then to go to her sister Louisa and her bodily heirs." It was contended that the devise to Pauline "and her heirs" vested a fee simple estate in her. The court said:

> "The general rule is that in a devise of lands to one without words of limitation the devisee takes an estate for life only, but the intention of the testator to give a fee or a less estate may be gathered from any part of the will. Thus the language, 'it is my will that my daughter Pauline shall have the other two-fifths of my estate,' if standing alone, would have created, at common law at least, an estate for her life only, and the subsequent words 'to be held by her and her heirs,' if read without reference to what follows, would be sufficient to vest in her a fee simple in remainder after her mother's life estate. But in construing the words of a devise the whole should be taken together. We are not to give an absolute technical meaning to one part of the language and then reject another part as inconsistent with it. As the former may be enlarged, so it may be restrained and qualified by what follows.
>
> "Now, after the words last quoted, which if left without qualification would have enlarged the life estate into a fee simple, the testator has added: 'At her death (Pauline's) all the same to go to her bodily heirs, should she leave any, but if she leave none,' then over. This clause in effect defines what is meant by the preceding use of the word 'heirs' and is a restraint upon its general application."

*Myar* v. *Snow,* 49 Ark. 125, 4 S.W. 381.

The court held that Pauline took a life estate only, and that the fee vested in her bodily heirs.

According to the decision of the Circuit Court of Appeals, Pauline would have taken the fee under the rule in Shelley's case, for a devise to Pauline for life, remainder to the heirs of her body, would have brought the devise within the exact definition of the rule. But the Supreme Court of Arkansas gave full effect to the intention of the testator, and held that Pauline took only a life estate, and the heirs of her body took the fee. The result of the conflict between the decisions of the state and the federal court is that under the former Pauline would take only a life estate whereas under the latter she would take the fee.

The will of Tennie Mayo devises her real property "to my son Lawrence Mayo and his wife Kate Mayo and their heirs during their natural lifetime." It then provides: "After the death of my son Lawrence Mayo and his wife Kate Mayo and their heirs all of my real estate shall revert to my legal heirs." Under the rule in *Myar* v. *Snow, supra,* this vested only a life estate in Lawrence and Kate, with the remainder in fee to the heirs of the testatrix, who were her two grandchildren, instead of vesting the fee in Lawrence and Kate to the exclusion of the grandchildren.

The only difference between the devise in *Myar* v. *Snow* and the devise in the present case is that in the *Myar* case the remainder after the life estate was given to the bodily heirs of the life tenant, and in the present case the remainder after the life estate is given to the legal heirs of the testatrix. We are not concerned, on this petition, with the question whether the legal heirs of Tennie Mayo are to be determined as of the date of her

death or as of the date of the deaths of the life tenants, for that is a question which goes only to the merits of the case. But we are vitally concerned, for the sake of titles to real property in Arkansas, with the conflict between the decision of the Circuit Court of Appeals and the decisions of the Supreme Court of Arkansas on an important rule of law governing the testamentary disposition of real estate.

It may be conceded that if the language of a will clearly shows an intention of the testator to devise real property to a devisee for life with remainder in fee to his heirs, to which the rule in Shelley's case would apply and would vest the fee in the devisee, the testator could not engraft limitations that would be repugnant to the devise of the fee, as contradistinguished from limitations showing a clear intention to cut down the fee. But when the language of the will clearly shows that the testator intended to devise a life estate only, with the remainder, not to the heirs of the life tenant, but to the heirs of the devisor, the rule in Shelley's case should not be applied so as to defeat the clear intention of the testator, and the Arkansas courts would not so apply it.

In an effort to give effect to certain technical words in the will of Tennie Mayo, the Circuit Court of Appeals construed the will to vest a fee simple estate in Lawrence and Kate, though the court said that "clearly a life estate was intended so far as Lawrence and Kate Mayo were concerned."

Under the Arkansas decisions, the unskillful or inappropriate employment of technical terms in a will is never permitted to thwart the clear intention of the testator—and the Circuit Court of Appeals said that the will in this case was "obviously drawn by an unskilled person."

The technical words "and their heirs" are incongruously used both in the devising clause and in the residuary clause, and they are obviously used in the same sense, but without an appreciation of their technical significance, in both clauses.

Notwithstanding the devise was to Lawrence and Kate "and their heirs", the court had no difficulty in determining from the succeeding words "during their natural lifetime" that: "Clearly a life estate was intended so far as Lawrence and Kate Mayo were concerned." This was in exact accord with the Arkansas decisions, for it gave effect to the intention of the testatrix. But the court then put a reverse curve on the technical words "and their heirs" by an application of the rule in Shelley's case, and thereby converted the life estate into a fee simple, contrary to the intention of the testatrix. This was in direct conflict with the Arkansas decisions. Under the state decisions the intention controls, when it clearly appears, regardless of the obscurity which the unskillful use of technical phrases might otherwise create.

In a leading case in Arkansas the will was as follows:

> "I give and bequeath to my beloved daughter, Nancy Johnson, all the rest and residue of my estate, real and personal or mixed * * * during her natural life, and then to be equally divided between the children of the said Nancy Johnson. *To have and to hold the same to her, the said Nancy Johnson, her heirs, executors, administrators and assigns to her and her use and behoof forever.*" (Italics supplied.)

It was contended that under the rule that "where two parts of a will are totally irreconcilable, the latter overrules the former," the daughter took the fee. But the

court held that the clear intention was to give her only a life estate, and that this intention should control. The court said:

> "We think, however, taking the intention of the testatrix as a guide, that there is no real inconsistency. The language employed in the first part of the clause, limiting the remainder to the children, was clear and explicit, was adapted to the commonest understanding, and was doubtless well understood by the testatrix. But that employed in the latter part of the clause, immediately following, was, in substance, such as is used in the *habendum* or formal clause, ordinarily inserted in deeds of conveyance—it was technical language, inappropriately and unskillfully used, the legal meaning of which it may be supposed was unknown both to the testatrix and the draughtsman. Inasmuch as, in common parlance, the word *heirs* is often inaccurately used to designate children, it might be inferred that the language was employed with the view of completing, but not changing, that which was done by the former part of the clause—though, most likely, it was used as mere matter of form, unintelligible to the testatrix, and to which she attached no definite meaning. To suppose that the testatrix, after giving to the children, in language too plain to admit of construction, an interest in the slaves, meant to deprive them of that interest by the use of the technical phraseology—to her a mere form of words—immediately following, without so much as expressly mentioning or referring to the children, would be most unreasonable. We cannot hold that such was her meaning. On the contrary, consistently with what seems to have been the intention of the testatrix, we reject the latter part of the clause in question as incongruous words, serving only to embarrass the plain provision with which they are connected."
>
> *Cox* v. *Britt*, 22 Ark. 567.

The case last cited shows the extent to which the Arkansas decisions give effect to the intention of the testator. The Circuit Court of Appeals correctly stated the rule in Arkansas. It said:

> "The cardinal rule in the construction of wills is that the intention of the testator must be ascertained if possible and must be given effect, unless in contravention of some established rule of law or public policy. * * * It is equally well settled, however, that a will cannot be construed so as to effectuate an intention of the testator which is contrary to a rule of law or public policy."

But the court incorrectly interpreted what the Arkansas decisions mean when they say that effect cannot be given to the intention of the testator if it violates some rule of law. By rule of law the Arkansas courts mean some established rule that constitutes a positive legal bar, such as the rule that a testator cannot devise a fee simple estate and make it inalienable, even though he intends to make it inalienable; the rule that a husband cannot devise his real property so as to cut out his widow's dower, though he intends to cut out her dower; the rule that one may not devise an estate which is not to take effect within the period of a life or lives in being, the period of gestation, and twenty-one years, though the testator intends that it shall not spring into being until after that period; and the rule that one cannot make a devise of real property free from the debts of the devisee, except by creating a spendthrift trust, even though such is the testator's intention. The rules of law that constitute positive bars have been established for the benefit and the protection of the public, and the law does not permit them to be violated. But the rules of law which would apply to the testamentary disposition of property in the absence of a

contrary intent may be ignored or contravened by the devisor. It is a rule of law that a devise of real property to a devisee, without more, will vest only a life estate, but this may be increased to a fee simple by subsequent language in the will showing an intention to give the fee. It is a rule of law that a devise to one and his heirs will vest the fee, but this may be cut to a life estate by a clearly expressed intention to give only a life estate (*Bowen* v. *Frank, supra.*) It is a rule of law that a devise to one for life with remainder to his heirs will vest the fee in the first taker under the rule in Shelley's case, but this may be converted into an entirely different estate by language which unmistakably declares an intention not to give the fee, but to give a different or less estate. It is a rule of law that where two clauses in a will conflict with each other the last will control, but this rule may be reversed if the real intention of the testator requires a reversal, as was the case of *Cox* v. *Britt, supra.*

The decision of the Circuit Court of Appeals conflicts with the decisions of the Supreme Court of Arkansas which announce the foregoing principles governing the testamentary disposition of real property in Arkansas. The court found that it was clearly the intention of the testatrix to give only a life estate to Lawrence and Kate, but said that the devise included "their heirs," and that "in form this was a devise of a remainder to them," which under the rule in *Shelley's* case, gave Lawrence and Kate the fee. Under the Arkansas decisions, however, the devise to Lawrence and Kate and their heirs "during their natural lifetime" vested only a life estate in them, notwithstanding the unskillful use of the words "and their heirs," (*Cox* v. *Britt, supra,*) and the residuary clause "after the death of my said son Lawrence and his wife

Kate Mayo and their heirs, all of my real estate shall revert to my legal heirs," vested the remainder, on the termination of the life estate, in the legal heirs of the testatrix, who were her grandchildren, notwithstanding an unskillful repetition of the words "and their heirs."

After construing the words "and their heirs" in the devising clause to be "in form a remainder" to the heirs of Lawrence and Kate, the court held that the will so construed brought the devise within the rule in *Shelley's* case and vested the fee in Lawrence and Kate, contrary to the clear intention of the testatrix to give them a life estate only, and that the express limitations in the will, which showed a positive intention not to give the fee, violated the rule against restricting the alienability of a fee, and the rule against devising a fee after a fee, because the unskillful use of technical words in the will created a fee.

The Arkansas courts, having once found from the language of the whole will that the clear intention was to give a life estate only to Lawrence and Kate, would have disregarded the words "and their heirs" in both the devising and the residuary clauses "as technical language inappropriately and unskillfully used, the legal meaning of which it may be supposed was unknown both to the testatrix and the draughtsman," (*Cox* v. *Britt, supra.*) and would have construed the will as a devise to Lawrence and Kate "during their natural lifetime," with remainder to the heirs of the testatrix.

The Arkansas courts would never have eliminated the words "and their heirs" from the testamentary picture, in order to give effect to the intention of the testatrix, and then have brought them back into the picture, and

given them their technical meaning, when to do so would defeat the intention of the testatrix.

Tennie Mayo made a very natural will in the circumstances. At the time she made the will, and at the time of her death, Lawrence and Kate had no children. She knew that Lawrence might have children either by Kate or by another wife. If so, the testatrix's grandchildren would be the natural objects of her bounty. Under her will, construed according to the Arkansas decisions, Lawrence and Kate would have taken a life estate, and the two grandchildren of the testatrix, Nathan and Mildred, would have been taken the fee. Each would have taken an undivided one-half interest, and Nathan's interest would have inured to the defendant, Venda C. Abramson, under the warranty in his deed to her. The decision of the Circuit Court of Appeals gives the fee simple estate to Lawrence and Kate, and cuts out both of the grandchildren. This is in direct conflict with the decisions of the Arkansas courts.

> "Unless there is a manifest intention to the contrary, the presumption that the testator intended that his propery should go in accordance with the law of descent and distribution will be applied as an aid in construing the will; * * * * the heirs at law will not be disinherited by mere conjecture, but only by express words in the will, or by necessary implication arising from them."
>
> *Yeates* v. *Yeates,* 179 Ark. 543, 16 S.W. (2d) 996.

> "Intent to disinherit the heir is essential to raise an estate by implication, the presumption being, in the absence of plain words in the will to the contrary, that the testator intended that his property should go in the legal channel of descent."
>
> *Wallace* v. *Wallace,* 179 Ark. 30, 13 S.W. (2d) 810.

In construing an Arkansas will the Circuit Court of Appeals held that it would not put a construction on a will that would do violence to what the court might conceive to be the natural impulses of a testator unless compelled to do so by the positive language of the will. The court said:

> "The statement of such a proposition reveals its abnormality to be so far unnatural and shocking as to be rejected except in the face of clear proof of such intention. While such an intention is not unlawful, yet it is unnatural and opposed to good conscience. It will, therefore, never be presumed by equity, nor will it be accepted as present, unless clearly proven to be so."
>
> *Rolfe* v. *Coates,* 282 Fed. 586 (C.C.A. 8)

By providing that the farm was to be used for the support and maintenance of Lawrence and Kate only as long as they should live, with the express understanding that they were not to mortgage or sell it, Tennie Mayo, who knew their circumstances, needs and dispositions, intended to shield them against their own extravagance and improvidence during their life time. She also intended that at their deaths her property should go to her legal heirs, whoever they might be, and not to the heirs of Lawrence and Kate, unless they turned out to be her heirs also. But her intentions were thwarted, and the disposition of her property changed, because the Circuit Court of Appeals thought that her intentions antagonized the rule in Shelley's case. This could never have happened in an Arkansas court under the Arkansas decisions.

Of course, this court is not concerned with the merits of a case in a petition for a *certiorari.* It is only concerned with the conflict between the decision of the Cir-

cuit Court of Appeals and the decisions of the Supreme Court of Arkansas on an important rule of real property in the State of Arkansas.

There is no question of local law of greater importance than the legal rules governing the testamentary disposition of real property.

Respectfully submitted,

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(25)



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942

No. 850

MILDRED MAYO DEAL ..... *Petitioner*

v.

VENDA C. ABRAMSON ..... *Respondent*

## BRIEF ON BEHALF OF RESPONDENT UPON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR EIGHTH CIRCUIT

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PARAGON PRINTING CO., LITTLE ROCK

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Cases and Notes in:

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## BRIEF ON BEHALF OF RESPONDENT UPON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR EIGHTH CIRCUIT

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## STATEMENT

This case was submitted upon an agreed statement of facts which are clearly set forth in the opinion of the Circuit Court of Appeals (R. 24-27) and briefly are as follows:

Tennie Mayo died in 1895 and insofar as pertinent here we quote from her will:

> "I give and bequeath all of my real estate of whatever description to my son Lawrence Mayo and his wife, Kate Mayo, and *their heirs* during their natural life time to be used for their support and maintenance only as long as they shall live with the express understanding that they are not to mortgage or sell the same. After the death of my said son Lawrence Mayo, and his wife, Kate Mayo, *and their heirs, all of my real estate shall revert to my legal heirs.*"

Lawrence Mayo was the only child of Tennie Mayo, and he survived her. Lawrence had married Kate prior to the time that his mother made the will and Kate was his wife at the time of his mother's death in 1895, and on May 23, 1906, Lawrence and Kate had a child, Nathan C. Mayo. Kate Mayo died thereafter, and Lawrence remarried and to his second marriage was born one child, the petitioner, Mildred Mayo Deal. Lawrence Mayo died February 16, 1937, leaving two children, Nathan C. Mayo, the child of the first marriage, and Mildred Mayo Deal, the child of the second marriage.

On May 24, 1904, during the lifetime of Kate Mayo, Lawrence Mayo and Kate Mayo conveyed the lands set forth in the complaint in fee simple by warranty deed to Rudolph Abramson, and Rudolph Abramson devised the lands in fee simple to Venda C. Abramson, respondent herein. On July 16, 1930, Nathan C. Mayo, son of Lawrence and Kate Mayo, conveyed the land to Venda C. Abramson, the respondent, and she has been in continued possession of said land since the date of the deed from Lawrence and Kate Mayo on May 25, 1904.

This suit was brought in partition by Mildred Mayo Deal, the petitioner against Venda C. Abramson, respondent here, on the theory that it was the clear intent of

the testator to give a life estate to Lawrence and Kate Mayo with a contingent remainder in whoever might be the heirs of Tennie Mayo at the death of the life tenants.

This granddaughter of Tennie Mayo, the child of Lawrence Mayo by his second wife, asserts that she is entitled to half of the property because Nathan and she happen to be the heirs of Tennie Mayo as of the death of the survivor of the two life tenants, Lawrence and Kate. It is her contention that the words "and their heirs" in the devise had no significance whatever and the words "revert to my heirs" means heirs existing at the death of Lawrence.

It is the position of the respondent that by proper construction of this will that the real estate vested in fee simple in Lawrence Mayo and Kate Mayo, and that any other construction of this will would result in repugnancy to the devise in fee simple created by the words, "to Lawrence Mayo and his wife, Kate Mayo *and their heirs,*" and would also be violative of both the rule against perpetuities and the rule against restraint upon alienation; that furthermore, if significance was to be given to the words "for their natural life" that it would be construed as Lawrence and Kate for life and then to their heirs which upon application of the rule in Shelley's Case created a fee simple in Lawrence and Kate and that the remaining words were repugnant and violative of the rule against perpetuity and restraint upon alienation; that if the word "heirs" were not to be construed as words of limitation but words of purchase, that the remainder could only vest in the child of Lawrence and Kate and not a child of Lawrence by a second marriage; that if it was a defeasable estate, the gift over upon failure of issue of Lawrence and Kate failed because they had issue.

It was further presented by the respondent that even if by proper construction of the will a life estate was created in Lawrence and Kate Mayo, that the words "revert to my legal heirs" necessarily meant a vested remainder to take effect as of the death of the testator, and that since Lawrence Mayo was the only legal heir of Tennie Mayo as of this date of her death, that it created a vested remainder in Lawrence Mayo which passed by his warranty deed.

The district court dismissed the complaint for want of equity on the theory that the words "*To Lawrence and Kate and their heirs*" could only mean a devise in fee simple, and that the remainder of the devise was repugnant and violative of the rule against perpetuities and restraint upon alienation. The Court refused to follow the theory of the petitioner that the words, "and their heirs" had no significance, and indicated that there was no such clear intent as indicated by the Petitioner.

The United States Circuit Court of Appeals held that the intent of the testator was to give a life estate to Lawrence and Kate and a remainder to their heirs, and that under the rule in Shelley's Case, existing in Arkansas, this created a fee simple title in Lawrence and Kate, and that the remaining portion of the will, restricting the right of sale or mortgage was void for repugnancy and violative of the rule against restraint upon alienation; that the reversion to the heirs of Tennie Mayo after the fee was in effect a fee simple after a fee and violative of the rule against perpetuity, and if construed as a defeasable fee, subject to be defeated by failure of the heirs of Lawrence and Kate, the remainder also failed because the contingency did not happen; that furthermore the words "heirs" in the devise had reference only to the heirs of

Lawrence and Kate, and since they had an heir still living, that the condition upon which the estate might revert to the heirs of Tennie Mayo had not occurred in that the heir of Lawrence and Kate was still living.

Neither court saw fit to comment upon the theory expressed by respondent that if the will was construed to mean a life interest in Lawrence and Kate that the remainder would have been a vested remainder in Lawrence who was the heir at time of her death, which passed by the warranty and not a contingent remainder to be determined as of the death of the survivor of the life tenant. The respondent deems a consideration of this point most important because it conclusively shows that regardless of whether there was a life estate created in Lawrence and Kate, that under no theory could this petitioner have an interest in the remainder and that, therefore, she could not prevail under any theory. Certainly if she cannot establish a right in the remainder, it is no concern of hers what the court construed the will to mean.

This petition for *certiorari* is now before this court on the theory that "under the decisions of the Arkansas Court the will of Tennie Mayo devised a life estate to Lawrence and Kate with remainder in fee to the two grandchildren who were her heirs" (Petitioner's Br. 6) as of the death of the survivor of Lawrence and Kate, and that the district court and the Circuit Court of Appeals by denying this construction has decided an important question of local law in conflict with the settled law of Arkansas and that a very serious error in the fixed rules of property has occurred in which the petitioner is vitally concerned in correcting.

If we properly understand the purpose of a respondent's brief, it is not for the purpose of discussing the case on its merits, but to point out to the court as briefly and concisely as possible wherein the petitioner is correct, or in error, in the assumption that the Circuit Court of Appeals has not applied the law of Arkansas properly in reaching its decision, and we submit that the only issue this petitioner can be concerned with is as to whether or not the court misapplied a well settled principal of property law in not adjudging that this petitioner had a contingent remainder in one-half of the property upon the death of Lawrence and Kate Mayo.

## POINTS AND AUTHORITIES RELIED ON

### I

The Language Used in the Will has Never Been Before the Supreme Court of Arkansas for Construction, and Particularly the Court has Never Said That a Devise to a Child and His Wife and Then to the Heirs of the Testator Created a Contingent Remainder in the Heirs Living at Time of the Death of the Life Tenant

### II

Under the Decisions of the Arkansas Supreme Court, the Intention of the Testator Controls if Clearly Expressed Unless in Conflict With Fixed Canons of Construction or Overthrows Legal Principles or Policy: Where Not Clearly Expressed Canons of Construction Must be Applied

*Driver* v. *Driver,* 187 Ark. 875, 63 S.W. (2d) 274;
*First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S.W. (2d) 14;

*Leflore* v. *Handlen,* 153 Ark. 431, 240 S.W. 712.

### III

The Intention of the Testator Was Not Clearly Expressed and Particularly it Was Not His Intent to Create a Life Estate in Lawrence and Kate With a Contingent Remainder in the Heirs of the Testator Living at the Death of the Life Tenants

IV

The Language in This Will When Properly Construed Created a Fee Simple Title in Lawrence and Kate in Accordance With the Canons of the Construction and Principles of Policy Declared by the Supreme Court of Arkansas and This Construction Conflicts With no Decision of That Court

*Bernstein* v. *Bramble,* 81 Ark. 483, 99 S.W. 682;

*Bird* v. *Sweringer,* 179 Ark. 402, 16 S.W. (2d) 569;

*Bowen* v. *Frank,* 179 Ark. 1004, 18 S.W. (2d) 1039;

*Cribbs* v. *Walker,* 74 Ark. 104, 85 S.W. 244;

*First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S.W. (2d) 14;

*Hardage* v. *Stroup,* 53 Ark. 303, 24 S.W. 490;

*Letzkus* v. *Nothwang,* 170 Ark. 403, 279 S.W. 1006;

*Moody* v. *Walker,* 3 Ark. 147;

*Payne* v. *Hart,* 178 Ark. 100, 9 S.W. (2d) 1059;

*Shields* v. *Shields,* 179 Ark. 167, 14 S.W. (2d) 548;

*Wilmons* v. *Robinson,* 57 Ark. 517, 55 S.W. 950;

*United States* v. *Moore,* 197 Ark. 644, 124 S.W. (2d) 807;

Underhill on Wills Vol. 2, p. 689;

*Wiggins* v. *Hill,* 143 Ark. 152, 223 S.W. 394.

V

The Language in This Will When Properly Construed a Life Estate With Remainder Over Unaided by the

Rule in Shelley's Case or any Other Canon of Construction

*Powell* v. *Hayes,* 176 Ark. 660, 3 S.W. (2d) 974;

*Jenkins* v. *Packington Realty Company,* 167 Ark. 602, 268 S.W. 620.

VI

Even if no Significance is Given to the Word "Heir" in the Will and if the Language of the Will Should be Construed to Read "Lawrence and Kate for Life and Then to the Heirs of the Testator" the Petitioner Could Not Recover as She was Not an Heir at the Time of the Death of Tennie Mayo

*First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S.W. (2d) 14;

*Himmel* v. *Himmel,* 294 Ill. 44, 128 N.E. 641, 13 A.L.R. 608;

*In re Busby's Estate,* 94 New Jersey Equity 131, 118 Atl. 835;

*Say* v. *Creed,* 5 Hare 186;

*Ware* v. *Roland,* 2 Philadelphia Chancery 635;

*Carey and Scheuller Future Interest,* Sec. 128;

*Kale's Future Interest,* 2d Ed., Sec. 570;

13 A.L.R. 608;

20 A.L.R. 356;

30 A.L.R. 915;

127 A.L.R. 595.

## ARGUMENT

### I

*The Language Used in the Will has Never Been Before the Supreme Court of Arkansas for Construction, and Particularly the Court has Never Said That a Devise to a Child and His Wife and Then to the Heirs of the Testator Created a Contingent Remainder in the Heirs Living at Time of the Death of the Life Tenant*

The first fallacy in the petition is the assertion that this court has decided any question of local law in a way conflicting with an Arkansas decision. We have been unable to find a will in Arkansas or in any other jurisdiction in any way similar to this one. The language is most unique and ambiguous and as pointed out by the Circuit Court of Appeals, it was obviously drawn by an unskilled person. The will devised the property to my son "Lawrence Mayo and his wife, Kate Mayo *and their heirs* during their life *and after the death of my son Lawrence* and Kate Mayo *and their heirs all* of my real estate *shall revert to my legal heirs.*"

The petitioner has asserted throughout her brief that this will expressed a clear intent. Certainly the words "and their heirs" and the words "during their life" could not be reconciled literally except by interpreting it to mean that after the death of Lawrence and Kate and their heirs or children, it would revert to the testator's heirs—an indefinite failure of issue.

Therefore, we respectfully submit that the will has no counterpart. We must approach it by analogy: by de-

termining, if we can, the intent of the testator and applying it, if not contrary to fixed canons of construction or principles of policy; and if the intent is not clear, to construe it in the light of fixed canons of construction. The petitioner has certainly not cited any case in piont in Arkansas, and there are none, nor can it be said to conflict with any interpretation under general law, although that point is not raised in the petition, but whatever it be, it does not show a clear intent to create a contingent remainder in the heir of the testator living at the death of the life tenant, under the law of Arkansas.

## II

*Under the Decisions of the Arkansas Supreme Court, the Intention of the Testator Controls if Clearly Expressed Unless in Conflict With Fixed Canons of Construction or Overthrows Legal Principles or Policy: Where Not Clearly Expressed Canons of Construction Must be Applied*

Point II of petitioner's brief is as follows: "According to the decisions of the Arkansas Court, the intent of the testator if clearly expressed controls over all technical rules of construction." We find no fault with this statement as far as it goes. In the case of *Leflore* v. *Handlen*, 153 Ark. 421, quoted by petitioner (BP9) the court quoted with approval from the United States Supreme Court, "The first and great rule in exposition of will (to which all other rules must bend) is that the intention of the testator expressed in this will shall prevail provided it be consistent with the rules of law."

In the case of *Driver* v. *Driver,* 187 Ark. 876, 63 S.W. (2d) 274, quoted with approval in petitioner's brief, we quote as follows:

> "The cardinal rule of testamentary construction is to ascertain the intent of the testator and give effect to it, *unless the testator attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy.*"

In the case of *First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S.W. (2d) 14, quoted and approved in numerous cases since, the Court said:

> "The law favors the early vesting of estates and if the will is susceptible to a double construction by one of which the estate becomes vested and by the other the vesting is postponed, the first construction will be adopted even though it might have been the intention of the testator to limit its present enjoyment *where the intention if executed would overthrow a legal principle.*"

So in this case, it having been seen that by Paragraph 5 of the will, the beneficiaries became vested at the death of the testator of the estate devised, the subsequent attempt to limit its enjoyment must be held void. The title to property once given away canot be regained by the hand that gave it. Notwithstanding this rule sometimes appears to operate harshly in defeating the probable intention of the testator, which is presumed to be the goal of judicial construction, its observance has been deemed safer than one which for want of strictness would be attended in its application with all sorts and shades of doubt and uncertainty."

Therefore, it would appear to more correctly state the law to say that the court will give effect to the clear intent

of the testator provided it does not confilct with some fixed rule of law or public policy.

This is definitely the law of Arkansas and every other jurisdiction, so far as we can find. We point this out to clarify the statement made that no technical construction can defeat the intent, although which ever it may be would not affect the result here, because there is obviously no "clear intent" expressed, but to the contrary a most ambiguous expression of intent that only canons of construction can interpret. One would have to be most partisan to say there was any clear intent expressed and particularly to say that it was a clear intent to create a life estate in Lawrence and Kate with contingent remainder in the heirs of the testator to be determined as of the death of the survivor of the two life tenants. If that result be reached, it would certainly have to be by canons of construction if at all.

## III

*The Intention of the Testator Was Not Clearly Expressed and Particularly it Was Not His Intention to Create a Life Estate in Lawrence and Kate With a Contingent Remainder in the Heirs of the Testator Living at the Death of the Life Tenants*

The intention of this testator was certainly ambiguous.

There are numerous possible and plausable theories that might be presented in an effort to arrive at what this testator intended. While not in the record, we feel that opposing counsel will not deem us unfair in stating that the trial court expressed the opinion that it was evidently the intent of the testator to give to Lawrence and Kate

and unto the issue of their union the use of the property until the line failed and upon the indefinite failure of their issue that the property would revert in remainder to the heirs of the testator. The matter having been presented to one of the outstanding authorities on real property—a teacher of real property law in one of our leading universities—he expressed a view that she intended to create a fee simple title in Lawrence and Kate with a gift over to the heirs of the testator on the failure of issue of Lawrence and Kate, and that since the condition upon which the gift over was limited did not occur, there being no failure of issue, the fee became absolute.

The Circuit Court of Appeals stated in their opinion that it was intended to give a life estate to Lawrence and Kate and a remainder to their heirs indefinitely.

The petitioner contends that the testator did not intend to mean anything by the word "and their heirs"; that there was intended a life estate with contingent remainder to the heirs living at the time of the death of the survivor of the life tenants. Yet we find in all the decided cases where there was a life estate followed by a remainder to the heirs of the testator that the word "heir" meant the heir living at the date of the testator's death, because these words indicated the intent of the testator to fix the date of determining the remainder as of the testator's death.

How then can this petitioner maintain that the clear intent was to create a life estate in Lawrence and Kate and a contingent remainder in the heirs of the testator as of the death of the life tenant?

Therefore, to contend that this case should be reviewed because the Court has held contrary to the clear intent of the testator as unequivocally interpreted by the Supreme Court of Arkansas is not tenable; and cannot be supported by any case. We have no desire to question the rule as stated in Point II but it has no application here.

## IV

*The Language in This Will When Properly Construed Created a Fee Simple Title in Lawrence and Kate in Accordance With the Canons of Construction and Principles of Policy Declared by the Supreme Court of Arkansas and This Construction Conflicts With no Decision of That Court*

While we fully recognize that the purpose of a respondent's brief has fulfilled its purpose in a case of this kind when it demonstrates that the decision is not in conflict with any local laws we shall proceed a step further and show that it not only is not in confilct, but is completely in harmony with the decisions of the Supreme Court, and that the will has been construed in accordance with the canons of construction and principles of policy declared by the court.

In the proper consideration of a will, there are certain declared policies and canons of construction of the law that are applied not always in aid of carrying out the intent of a testator, but in fact, in some instances, even to defeat the intent of a testator when contrary to these expressed policies and canons of construction. Examples of these declared policies of the law that sometimes defeat the intent of the testator are the rule against per-

petuities and the rule against restraint upon alienation and examples of canons of construction which may become pertinent here are (1) that the law favors the vesting of testamentary interest at the earliest possible moment, (2) a construction that would create a vested remainder rather than a contingent remainder would be adopted (3) the rules against repugnancy in a will, and (4) the rule in Shelley's case. All of these principles of policy and canons of construction are pertinent here.

Therefore, it is respectfully submitted that to undertake to indulge in various theories as to the clear intent of the testator, considerable confusion must necessarily arise. We cannot approach the problem at hand with the confidence as expressed by the petitioner as to the clear intent of the testator, but we must take this will and interpret it aided by the restrictions placed upon devises by the rule against perpetuities and restraint upon alienation and the fundamental canons of construction which must be used in aiding the court to reach a result consistent with those fixed principles that have been adhered to by the courts without question.

There can be no question but that a devise to "Lawrence Mayo and his wife, Kate Mayo, and their heirs" created a fee simple title in Lawrence Mayo and his wife, Kate Mayo. It is not even necessary to depend upon the rule in Shelley's case for this to be true. The rule in Shelley's case, which is adopted as part of the common law of this State as a rule of construction, simply provides that where an estate of freehold is limited to a person for life and then by remainder to his heirs in fee simple, that the word "heirs" is taken as a word of limitation, causing the first taker to have a fee simple title in the property. (*Shields* v. *Shields*, 179 Ark. 167, 14 S.W. (2d) 548; *Wil-*

*mons* v. *Robinson,* 57 Ark. 517, 55 S.W. 950.) This rule, as one of construction, was created to merge the remainder into the life estate of the first taker, where the remainder was to the heirs of the first taker, but from the very earliest days of common law and unaided by any court made of statutory enlargement, a devise to "A and his heirs" created the purest type of a fee simple title.

Obviously, any attempt to limit this fee simple title in Lawrence and Kate for their lifetime was inconsistent with the grant in fee and, therefore, repugnant and void. It is to be noted that the testator reiterates the grant to Lawrence Mayo and his wife, Kate Mayo, "and their heirs" by providing that "after the death of Lawrence and Kate and their heirs" that the real estate should revert to the legal heirs of the testator. This was repugnant and void and the undertaking to restrict the use of the land by the provision "that it is not to be mortgaged or sold," violates the declared policy of the law against restraint upon alienation which likewise makes this clause void.

Possibly the most often quoted case in this State with reference to numerous principles of will construction is that of *Moody* v. *Walker,* 3 Ark. 147. One quotation from this case appears in numerous decisions since, and it is as follows:

> "If a testator gives propery absolutely in the first instance to a legatee, he cannot afterwards subject it to any limitation or provision whatever as for example that he shall hold it for life or that he shall not spend it in a particular manner. The absolute right of ownership carries with it full power of disposing of the property."

Another important case often quoted from is that of *Bernstein* v. *Bramble,* 81 Ark. 483, 99 S.W. 682. The Court said:

> "The property in controversy was devised to Minna Elle in fee simple with absolute power of disposition whether by sale or devise, clearly or unmistakably implied and according to the authorities cited, the limitation over to Moritz Elle and Henrietta Bernstein is void."

In case of *Payne* v. *Hart,* 178 Ark. 100, 9 S.W. (2d) 1059, which we submit as very analogous to the instant case, we have the following item in the will:

> "I will and bequeath to my nephew, John E. Hart and his heirs forever, the 53-acre tract he now lives on, being the part of what is now ( )as the Adams Land, said land being entailed to the heirs of the said John E. Hart forever, never to be mortgaged or sold."

The Court said that the only question for determination in this case was whether or not this devised a fee simple estate. The Court, recognizing that in the proper construction of a will the intent of the testator must be ascertained, said:

> "The first paragraph of Item One of the will by express language 'to my nephew, John E. Hart, his heirs forever,' clearly conveyed an absolute fee to the devisee, John E. Hart, and the interest thus given could not be cut down or diminished by the later conflicting and repugnant clause declaring the land entailed to the heirs of the said John E. Hart forever, never to be mortgaged or sold." (Quoting from *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S.W. 682.) "There is nothing in the language indicating an intention to

give a life estate to the devise and the heirs of his body except the word 'entailed' which cannot have to limit the fee expressly given to said devisee and his heirs to an estate tail, the devisee taking a life estate only under the Statute."

"The sentence providing 'never to be mortgaged or sold' was an attempt to deprive the fee simple estate devised of its alienability and is void for repugnancy. (*Fies* v. *Feast*, 145 Ark. 351, 224 S.W. 633; *Letzkus* v. *Nothwang*, 170 Ark. 403, 279 S.W. 1006; *Davis* v. *Sparks*, 135 Ark. 413, 205 S.W. 803; *Combs* v. *Combs*, 172 Ark. 1173, 291 S.W. 818)."

In the case of *Letzkus* v. *Nothwang*, 170 Ark. 403, 279 S.W. 1006, there was the following devise:

"Any and all other property of which I may die possessed, real, personal and mixed, I give to my sons, David Henry Nothwang and Frederick Nothwang, share and share alike."

A subsequent paragraph reads as follows:

"All the property I give to my said sons as set out above, is given, however, subject to the following expressed condition, that is, that each of said sons shall hold his respective share herein conveyed to him for the period of ten years before he shall be permitted to mortagage or in any manner encumber and convey any part thereof."

The Court said that this clause which prohibited the selling or mortgaging of this property was in the form of a condition subsequent and void because it was repugnant to the estate conveyed and the Court, quoting from Page on Wills, said that it was not only repugnant to the estate conveyed but was a restraint upon alienation. The Court

concluded with the following quotation after discussing at length cases from various states:

> "So here the will of Nothwang devised a fee simple estate to his sons which vested upon the testator's death and the attmept to deprive this estate of its alienability is void for repugnancy." *Davis* v. *Sparks,* 135 Ark. 412, 205 S.W. 802; *Bernstein* v. *Bramble,* 81 Ark. 480, 99 S.W. 682.)

In the case of *First National Bank of Fort Smith* v. *Marre,* 183 Ark. 699, 38 S.W. (2d) 14, there was a devise to the children of the testator of both personal property and real estate. A subsequent paragraph undertook to create a trust of the property for the children. The Court said:

> "The effect of the fifth paragraph of the will was to make an absolute gift of the personal property of the testator to the beneficiaries and a devise to them of the real estate in fee simple. By subsequent paragraphs an attempt was made to limit the use and to defer the acquisition of the property theretofore given outright and to create a trust to effectuate these limitations. This was repugnant to the absolute disposition of the property before made and in violation of the well settled rule that where an absolute gift or devise is made a subsequent attempt in the will to limit the possession, enjoyment or disposition of the property is void. Immediately upon the death of the testator, the property vested absolutely in the beneficiaries and as a necessary incident to the ownership they became entitled to the immediate possession and enjoyment of the property with the right of present alienation. This rule was recognized by the court at an early date and has since been consistently adhered to. If a testator gives property absolutely in the first instance to a legatee, he cannot afterwards

subject it to any limitation or provision whatever." (*Moody* v. *Walker*, 3 Ark. 147.)

The Court quoted with approval the case of *Letzkus* v. *Nothwang*, 170 Ark. 403, 279 S.W. 1006, *supra*, and we again quote another paragraph from this case of *First National Bank of Fort Smith* v. *Marre*, which is also pertinent:

> "The law favors the early vesting of estates and if the will is susceptible to a double construction by one of which the estate becomes vested and by the other the vesting is postponed, the first construction will be adopted even though it might have been the intention of the testator to limit its present enjoyment where the intention if executed would overthrow a legal principle. So in this case, it having been seen that by Paragraph 5 of the will, the beneficiaries became vested at the death of the testator of the estate devised, the subsequent attempt to limit its enjoyment must be held void. The title to property once given away cannot be regained by the hand that gave it. Notwithstanding this rule sometimes appears to operate harshly in defeating the probable intention of the testator, which is presumed to be the goal of judicial construction, its observance has been deemed safer than one which for want of strictness would be attended in its application with all sorts and shades of doubt and uncertainty."

The general principle also has been very aptly expressed in many cases that a devise in fee simple cannot be cut down or diminished by any subsequent vague, general contradictory or ambiguous limitation and as expressed in Underhill on the Law of Will, Vol. 2, page 689:

> "It is a rule that where property is given in clear language sufficient to convey an absolute fee, the in-

terest given shall not be taken away, cut down or diminished by any subsequent vague and general expressions."

As to the case of *Bowen* v. *Frank*, 179 Ark. 875, 18 S.W. (2d) 1039, the word fee simple is used in the first clause but in a later clause as to three devisees there was a clear intent expressed to give the devise only a life estate and remainder in fee in his child.

The will had been construed several times by the Supreme Court of Tennessee, and the Supreme Court of Arkansas adopted their construction. It followed no previous decision, nor was it ever quoted in the case of *First National Bank* v. *Marre, supra,* which came later or in any subsequent case on this point. It is anomalous but innocuous. Assuming that it was authority for the principle that a grant of a fee could be cut down in a later clause where the intent is clearly expressed, what bearing does that have on an ambiguous phrase, such as "to Lawrence and Kate and their heirs for life—and upon the death of Lawrence and Kate and their heirs it shall revert to my heirs?"

How by any possible judicial interpretation could that case apply to a devise "to Lawrence and Kate and their heirs" when immediately followed by subsequent vague and general expressions absolutely repugnant to the significance of the words "and their heirs?" In the case of *First National Bank* v. *Marre,* there was a devise to "A" without qualification. In a subsequent paragraph there was an attempt to limit this devise with a trust and the court held very clearly that the latter clause was void.

The case of *Moody* v. *Walker, supra,* was quoted and approved in this case. Both *Moody* v. *Walker* and *First National Bank* v. *Marre* were cited and approved in the case of *U. S.* v. *Moore,* 197 Ark. 664, 124 S.W. (2d) 807. *Moody* v. *Walker* has never been departed from and it is also the first case to declare the law with reference to the rule against perpetuities, in Arkansas.

The district judge interpreted the intention of the testator to create an entailment of the property indefinitely until there was a failure of issue and then a reversion to the heirs of the testator. He applied the declared policy of the law against perpetuities (*Moody* v. *Walker, supra,* and *Cribbs* v. *Walker,* 74 Ark. 104, 85 S.W. 244, and the declared policy against restraint upon alienation (*Letzkus* v. *Nothwang, supra*). He applied the canon of construction against repugnancy and he eliminated the life estate in that it was repugnant to the grant in fee and held there was a fee.

The Circuit Court of Appeals interpreted the language to intend a life estate in Lawrence and Kate and a remainder to their heirs thereby reconciling both the words "and their heirs" and "for their natural life." The rule in Shelley's case was then applied to this interpretation of intent, and as so applied this created a fee in Lawrence and Kate.

The rule in Shelley's case is adopted as part of the law of Arkansas as a rule of construction and simply provided that where there is an estate for life and there is a remiander in fee to the heirs of the life tenant, the word heirs are used as words of limitation causing the life tenant to have a fee simple. (*Hardage* v. *Stroup,* 53 Ark. 303, 24 S.W. 490; *Shields* v. *Shields,* 179 Ark. 167, 14 S.W.

548; *Wilmons* v. *Robinson,* 57 Ark. 517, 55 S.W. 950); *Bird* v. *Swearinger,* 179 Ark. 402, 16 S.W. (2d) 569.

The Court said the intent was to devise the property to Lawrence and Kate for life and then to their heirs. Then it applied the rule in Shelley's case and reached their result so the comment on *Hardage* v. *Stroup,* appearing on page 17 of petitioner's brief is not inconsistent with the Court's conclusion.

The Court, after applying this rule, eliminated the limitation on the sale and mortgage by applying the principle of policy. That part of the will which provided that after the death of Lawrence Mayo and Kate Mayo and their heirs the estate would revert was eliminated for the reason that it provided for a fee after a fee and thereby created an executory devise and as such it was void as it violated the rule against perpetuities. The Court also said that if the intent of the testator was to create a gift over on failure of issue that the remainder over failed because Lawrence and Kate had issue, citing *Wiggins* v. *Hill,* 143 Ark. 152, 223 S.W. 394.

Therefore, neither court applied any canon of construction or principle of policy in determining the intent in any way inconsistent with any decision of the Supreme Court of Arkansas. They both took a will which was ambiguous, contradictory, repugnant and violative of certain canons of construction and rules of policy and found what they considered the intent of the testator to be and construed it in accordance with the law of the state.

The case was carefully briefed and orally argued by counsel in both courts. The trial Judge had been engaged in Arkansas practice for a quarter of a century or more,

and every case was carefully considered and the decision made with the views of applying the Arkansas law insofar as applicable.

The difficulty we find with the petitioner's position is that she establishes a major premise that is not sound and reasons therefrom to an erroneous conclusion. This major premise is that it was the clear intent to give a life estate to Lawrence and Kate and a contingent remainder to their heirs living at the time of the testator's death. No such clear intent exists. Therefore, the chief error lies in the assumption that such clear intent exists.

## V

### *The Petitioner Could Not Prevail if the Will Only Created a Life Estate With Remainder Over Unaided by the Rule in Shelley's Case or any Other Canon of Construction*

Let us assume that this was a devise to Lawrence and Kate for life and then to their heirs and the rule in Shelley's Case did not apply and the rule against perpetuities did not prevail. It is observed that the will specifically designates Lawrence and his wife Kate "and their heirs". The petitioner is not an heir of Lawrence and Kate. The reference is to "their heirs", not an heir of Lawrence by a second marriage. This has been definitely settled in Arkansas by the case of *Jenkins* v. *Packingtown Realty Company,* 167 Ark. 602, 260 S.W. 620.

The question arose in this case as to whether a child by another marriage of the son, William, would share the estate with a child of William and Sarah. The Court said:

"There is a division in the authorities bearing on the interpretation of the language of this will. Counsel for the appellant cite authorities which support their contention that the words 'their children' include the children of a former marriage, but we are of the opinion that this view is contrary to better reason as well as to the weight of authority." (*Crapo* v. *Pierce*, 187 Mass. 141; *Crandall* v. *Ahearn*, 200 Mass. 77; *Hersam* v. *Aetna Life Insurance Company*, 225 Mass. 425; *Aetna Mutual Life Insurance Co.* v. *Clough*, 68 N. H. 298; *Evans* v. *Apperman*, 76 Texas 293; *Brown* v. *Aetna Life Insurance Co.*, 174 N. C. 339.)

"The plain meaning of the language is that it relates to the intermarriage between the two persons mentioned and not to all of the children of either of the persons so named. As said by the Massachusetts Court cited above, the phrase 'their children' must read collectively and not distributively; *hence it must be construed to relate to the issue of that particular intermarriage.*"

This case, therefore, we feel sure disposes of the theories presented by the appellant that children of Lawrence by any other wife would be considered where there is a devise to Lawrence and his first wife, Kate, whether the words "and their heirs" are used as words of limitation or words of purchase. The words "heirs" has been held to be not a word of limitation but in its non-technical sense to mean words of purchase and to connote children where the meaning was plain (*Powell* v. *Hayes*, 176 Ark. 660, 3 S.W. (2d) 974), but seldom is this construction applied. If the meaning "children" is given here, then Nathan had a fee simple which passed by his warranty. If the word "heirs" was not used to connote the children of this particular marriage creating in this child Nathan

a fee title then the word "heirs" would have to connote an entailment.

The Circuit Court of Appeals recognized the applicability of this case and specifically pointed out that since the word "heirs" meant the heirs of this marriage and there had been no failure of issue that even if there was a reversion to the heirs of the testator, that it could not vest until after the death of the heirs of Lawrence and Kate and, therefore, this petitioner could not maintain the suit now even if there could be a reversion after the death of the heirs.

## VI

*Even if no Significance is Given to the Word "Heir" in the Will and if the Language of the Will Should be Construed to Read "Lawrence and Kate for Life and Then to the Heirs of the Testator" the Petitioner Could not Recover as She Was Not an Heir at the Time of the Death of Tennie Mayo*

We now come to Point III in petitioner's brief which states that under the settled decisions of Arkansas, this will created a remainder to the two grandchildren after the death of Lawrence and Kate. The petitioner, after contending strongly that it was the clear intention of the testator to create a life estate in Lawrence and Kate with a contingent remainder in the heir Tennie Mayo living at the death of the survivor of the life tenants, makes the very unusual statement in her brief (see brief pp. 19-20), "We are not concerned on this petition with the question whether the legal heirs of Tennie Mayo are to be determined as of the date of her death or as of the death of the life tenants for that goes only to the merits of the case.

But we are vitally concerned for the sake of title to real property in Arkansas in the conflict between the Circuit Court of Appeals and the decision of the Supreme Court of Arkansas on an important rule of law governing the testamentary disposition of real estate."

Petitioner should be deeply concerned as to whether or not the heirs are determined as of the date of the death of the testator or the date of the death of the survivor of the life tenants as that is the real crux of the case, if Lawrence and Kate only had a life estate. The Circuit Court of Appeals has said that there was an intent to give a life estate to Lawrence and Kate and then disposed of the remainder by saying there was an intent to give the remainder to the heirs of Lawrence and Kate. The petitioner says an important principle of local law has been overthrown because it was the intent to give a life estate to Lawrence and Kate and a contingent remainder to their heirs of Tennie Mayo living at the death of the survivor. What is her purpose in filing this petition if it is not to show error in disposing of this remainder?

That is exactly what she is asserting. So let us determine now if there probably was an error made in applying the local law, since error as to this remainder is all the petitioner is concerned with. The only possible purpose of this petition is to show that the court misapplied local law not merely in creating a life estate, but in not awarding a contingent remainder to extent of one-half in the petitioner.

This respondent has been put to the expense of litigation in two courts and is deeply concerned with this issue.

Let us assume that the effect of this will was to create in Lawrence and Kate an estate for life and upon the death of Lawrence and Kate a remainder in the heirs of Tennie Mayo.

Who are "the heirs of Tennie Mayo" to receive this remainder and is it vested or contingent? Do we look to see who were the heirs at her death or at the death of the life tenant? That should be the sole point in which this petitioner is interested.

Except for the fixed canon of construction, that favors the early vesting of estate, this question has never been before the Supreme Court of Arkansas, so when petitioner says in his point III that under the decision of Arkansas, that the remainder was in the two grandchildren we must assert that is incorrect, and not one of the cases cited have the slightest reference thereto. These cases deal with the presumption against disinheriting an heir which have no application here.

In the case of *First National Bank of Fort Smith* v. *Marre, supra,* the Court said, "The law favors the early vesting of estates and if the will is susceptible to a double construction by one of which the estate becomes vested and by the other the vesting is postponed the first construction will be adopted."

We will show the Court, however, that the authorities in England and the United States are unanimous in holding that when there is a devise to *A* for life with a reversion to the heirs of the testator that this means the person or persons who would be the heir as of the date of the death of the testator and this rule applies even if the life tenant and the heir are the same person and so in the

instant case, the life estate would be in Lawrence and Kate with a vested remainder in fee to Lawrence which passed by his warranty.

The Court's particular attention is called to a very valuable collection of cases in the subject found in 13 A.L.R. 608, 20 A.L.R. 356, 30 A.L.R. 915, 127 A.L.R. 595, and see also *Ware* v. *Roland,* 2 Philadelphia Chancery 635, Kale's Future Interest 2nd Edition S.E.C. 572, Caney and Scheuller's Future Interest, Section 128.

The inception of this rule appears to have been in the early case of *Say* v. *Creed,* 5 Hare 180, when the Court said:

> "When a testator gives property to a tenant for life, and after the death of the tenant for life to his next of kin and there is nothing in the context to qualify or in the circumstances of the case to exclude the natural meaning of the testator's words, the next of kin of the testator at her death will take and if the tenant for life be such next of kin either solely or jointly with other persons he will not on their account be excluded."

In re Busby's Estate, 94 N. J. Eq. 131, 118 Atl. 835, is a case which states the principle very correctly found in all the cases which is that a limitation over to the heirs at law of the testator after a life estate refer to persons who are heirs at the time of the testator's death even though the life tenant should be the sole heir, the natural assumption to the contrary being insufficient to control the legal and fixed meaning of the words "heirs at law" as necessary referring to the testator's death in the direction in the will fixing some other time.

Editorial notes in these various volumes of A.L.R. assert this principle unequivocally.

The most important case in point, however, is that of *Himmel* v. *Himmel,* decided in 1920 in the Illinois Supreme Court. It appears in 294 Ill. 44, 128 N.E. 641, 13 A.L.R. 608, and is exactly in point referred to and accepted throughout all the authorities.

Mary Marshall, a widow, devised all of her real estate in trust for her son, Horace Marshall, until he should arrive at the age of 30 years, when the trust was to determine and then he was to have the real estate for and during his natural life and these provisions were followed by the fifth clause of the will which are as follows:

> "Upon the decease of my said son, I hereby direct that all of his real estate devised to him *for and during his natural life* to vest in fee simple in the issue of my said son surviving him, the descendants taking the share of any deceased child of said testator *and should he die without leaving issue surviving him, then it is my will that such real estate revert and go to my heirs* AS IF NO WILL HAD BEEN MADE."

(Here we have a provision for a life estate for the only child with a reversion to the heirs of the testator if the life tenant should die without issue.)

Mary Marshall died on February 8, 1913. Horace Marshall, the only child ever born to Mary Marshall, was therefore her only heir at law at the time of her death. He married Sara E. Marshall and died on November 23, 1918, at the age of 26 years, without leaving issue surviving him. The appellees are the half brothers and sisters of Mary Marshall and they filed suit against the wife of the de-

ceased son for the purpose of establishing that they should receive the property as the heirs of Mary Marshall because they were her heirs at the time of the death of Horace Marshall.

It was the contention of the appellants, who were the wife and heirs of Horace Marshall, that the heirs at law of Mary Marshall should be determined at the time of the death of Mary Marshall. *The sole issue presented was whether the heirs of Mary Marshall should be determined at the time of her death or at the time of the death of the life tenant and the further question necessarily before the Court was whether or not a son who was the only heir and who was given a life estate would be considered the heir under the will who took the remainder because he was her heir at the time of her death or would this situation create an exception to the general rule that the remainderman is determined as of the date of the death of the life tenant.* The Court said:

> "The word 'heir' in its primary meaning designates the person appointed by law to succeed to the estate in case of intestacy. Where the word occurs in the will, it will be held to apply to those who are the heirs of the testator at his death unless the intention of the testator to refer to those who shall be his heirs subsequent to his death is plainly manifested in his will."

The Court said that it was the established law of that State that where a life estate was devised to one of several heirs at law of the testator with the remainder to his heirs at law, the life tenant is included within the words "heirs at law" and is included in the devise of the remainder, but that the question which was now before the Court was whether or not there would be an exception

where the life tenant is the sole heir of the testator. In other words, should this sole heir be excluded from the remainder, so that the heirs at law be ascertained contingently as at the termination of the life estate? The Court said no. The Court indicated that it was the general rule of construction that the heirs would be determined as at the time of the death unless a different intent was plainly manifested by the will and after quoting a number of cases, the Court repeated that the principle is not a rule of substantive law but a rule of interpretation adopted as one means of ascertaining the intention of the testator and that his intention should be ascertained from the language of the whole will. We quote again from this case as follows:

> "The provision in the will of Mary Marshall was that upon the death of her son, Horace Marshall, without leaving issue surviving him the estate was to go to her heirs as if no will had been made. By the will she clearly manifested an intent to give her son a life estate and to secure and preserve to his issue surviving him a remainder in fee and on failure of that limitation she had no intention or wish to change the disposition which the law would have made in regard to her estate and she was to be considered as making no provision different from the law of descent and leaving the property to be disposed of by such law as if she had made no will. She expressed in her will all that she desired in the way of limitation of estate to her son for life and the fee to his issue if he should have any, and if the fee did not go to his issue, her will was that the real estate should go to her heirs in the same manner as intestate estate. *There is no positive or substantive rule of law based on the fact that Horace Marshall was the sole heir of the testatrix which interferes in any manner with the disposition of the real estate according to the intention expressed*

*by the testatrix and the persons who are her heirs at law and would have taken the estate as if no will had been made were ascertained at her death.* Horace S. Marsall, the sole heir at law of the testatrix would have taken the estate if no will had been made and the limitation to his issue having failed by his death without surviving issue, Sara Marshall, his widow took one-half in fee and the other half descended to his aunts and uncles living at the death of the testatrix, and the heirs and devisees of those who have died since, if any subject to the dower and homestead rights of Sara E. Marshall."

There is an annotation to this case of *Himmel* v. *Himmel* and we quote from the Editor as follows:

"Although some of the earlier decisions have appeared to recognize a contrary rule, the decided weight of authority is to the effect that the fact that at the time of the making of the will the person to whom a particular estate is given will presumably be, at the testator's death, the sole member of the class to whom the same property is limited, is not of itself sufficient to overcome the presumption that the membership of the class is to be ascertained as the testator's death."

And after this quotation from the Editor, a large number of cases are assembled.

Therefore, it is respectfully submitted that even if the arbitrary position of the petitioner in suggesting that the words "and their heirs" are superfluous and that they should give way to the words "during their natural life" rather than to follow the decisions of this Court, that where there is a devise in fee followed by an inconsistent grant, that the latter is repugnant and must give way to the former and if we are to assume as has been suggested by petitioner that the will devises a life estate to Lawrence

and Kate with the remainder in fee to the heirs of the testator then it must necessarily be concluded that there was a devise to Lawrence and Kate for life with the remainder in fee to Lawrence because he was the sole heir at law of the testator at the time of her death, and we further submit that there is absolutely not the slightest verbiage in this will that might be construed to indicate in any degree or even suggest any intention on the part of the testator to postpone the determination of her heirs until after the death of Lawrence and Kate, and create thereby a contingent remainder.

The cases are unanimous that this remainder vests as of the date of the death of the testator and that the fact that the sole heir is the first taker and will, therefore, also be the remainderman, is no exception to the rule. Here, of course, we have even a stronger situation because it was not solely the life of Lawrence that determined the preceding estate but it was the survivor of Lawrence and Kate that maintained this life estate and at the death of this survivor this vested remainder of Lawrence became effective.

Therefore, Point III in petitioner's brief, that under the decisions of the Arkansas Court the will of Tennie Mayo devised a remainder in fee to the two children as the sole heirs, is not only an incorrect statement in that the Arkansas Courts have never passed upon that point, but such an assertion is contrary to all the decisions in England and the United State. without a single exception.

Respondent has conceded that the words "revert to my heirs" may be treated for the purpose of this will construction as being the same as a remainder although in fact a true reversion is not created by the act of the

testator but by operation of law in leaving a residue to the heirs, in which event there would be intestacy after the life estate necessarily causing the property to descend to her heir living at the time of death. However, in *Doyle* v. *Keyes,* 9 N.E. 625, and *Himmel* v. *Himmel, supra,* the words reversion and remainder are used interchangeably, and we will so treat them for the purposes herein.

## CONCLUSION

The respondent recognizes that possibly this brief has gone somewhat beyond the purview of a brief on certiorari, but the very definite statements made by counsel for petitioners with reference to the decisions of the Arkansas Courts have made it necessary—particularly the assertion that on the death of Lawrence and Kate there was a remainder to the extent of one-half interest in the petitioner according to Arkansas decision. There are no such decisions in Arkansas.

Unfortunately, petitioner has assumed that there was a clear intent expressed in the will to create a life estate in Lawrence and Kate with a contingent remainder in the heirs of Tennie Mayo at the death of the life tenants, and from this major premise she proceeds to an erroneous conclusion. The premise is not correct. There is no such clear intent expressed. The intent is very difficult to determine but certainly no such intent as indicated by petitioners.

In petitioner's "Reasons Relied On" it is asserted that Arkansas decisions hold the intention governs even though it runs counter to rules that would otherwise control. This is not the pronouncement in *Driver* v. *Driver* and *First National Bank* v. *Marre, supra,* although this point is inconsequential here. It is asserted that the Circuit Court of Appeals applied the rule in Shelley's Case to defeat the clear intent of the parties. This is not correct. The intent was difficult to arrive at. It was a very ambiguous will. The Court, reconciling the inconsistencies, declared the intent to create in Lawrence and Kate an estate for life and then to their heirs, and applied the rule

of Shelley's Case, eliminating the rest of the language by applying other canons of construction.

It is respectfully submitted that both courts reached the right result in taking this ambiguous, contradictory instrument and by applying principles well fixed in the law of Arkansas.

It is further submitted that the word "heirs" could not be disregarded as petitioner would desire, and that even if the rule in Shelley's Case did not apply and this was a devise to Lawrence and Kate for life and after their death it would go to their heirs this meant the heirs of Lawrence and Kate, and not Lawrence and his second wife.

Finally, we do wish to insist that if this was a devise to Lawrence and Kate for life and then a remainder to the heirs of the testator, this petitioner cannot recover because she was not an heir as of the date of the testator's death; and that if petitioner seeks to evade this issue at this time, such position is not consistent with statements both in the petition and in the brief that there was a remainder in the petitioner under settled decisions of Arkansas. This issue should be met now and considered in determining whether this petitioner should subject this respondent to another trial. Why evade this issue if the Arkansas decisions cover it?

This point was urged both in oral argument and in brief by the respondent, but in both courts it was not considered necessary for a decision by either court. It should be considered now and disposed of as it has never been abandoned by the respondent.

In view of the fact that even if this word "heirs" should be disregarded as contended by petitioner and the will should read "Lawrence and Kate for life and then to the heirs of the intestate" the Supreme Court has never held that a devise for life with a remainder to the heir of the testator creates a contingent remainder in the heirs living at the death of the life tenant and certainly has never construed a will like this to create such an estate in this petitioner. Therefore, it is error to assert that this is a case where the Circuit Court of Appeals has probably decided an important question of local law in conflict with the applicable decision of the Supreme Court of Arkansas.

The petitioner has taken as her hypothesis that this will by clear intent has created this life estate with contingent remainder in the petitioner—a question never before the Court of this State. The case of *Himmel* v. *Himmel* disposes of the theory, and this Court certainly would not reverse and remand the case if the correct result was accomplished even though the theory and reasoning was not correct. Therefore, the result being correct, whatever the theory may be, no error has been committed.

It is respectfully submitted that this writ should be denied.

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